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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-844

EMERSON SUSENKEWA, ET AL., *Petitioners,*

V.

THOMAS S. KLEPPE, Secretary of the Interior, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

QUESTION PRESENTED

Whether a suit seeking to invalidate a coal mining lease was properly dismissed for failure to join the lessor as an indispensable party.

STATEMENT OF THE CASE

On June 1, 1964, the Hopi Indian Tribe entered into a drilling and exploration permit with Sentry Royalty Company, Peabody Coal Company's predecessor in interest. On June 6, 1966, the Hopi Tribe entered into the lease now before this Court, which lease provides the coal to fuel two large steam-

generating electric power plants.[1] On May 14, 1971, Petitioners, "traditional Hopi" (a spiritualist faction) brought this suit to invalidate the lease and stop the mining of coal on Black Mesa. The District Court for the District of Arizona held that the Hopi Tribe, being a party to the lease, was an indispensable party under Rule 19, Federal Rules of Civil Procedure. The Court also noted that since the record disclosed substantial expenditure of monies in the implementation of the lease and that the Petitioners had waited for over five years from the signing of the lease, the action would have been dismissed because of laches, were it not necessary to dismiss it for failure to join indispensable parties.

In a unanimous opinion the Court of Appeals for the Ninth Circuit affirmed the District Court Order on July 25, 1975, and denied Petitioners' Motion for Rehearing on September 18, 1975.[2]

REASONS FOR DENYING THE WRIT

Every American court that has ever considered the issue has held that both the lessor and the lessee are indispensable parties in a suit to cancel a real property lease. This suit involves nothing more than the application of that principle. There is no

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[1] Construction on the Mohave Plant, located in southern Nevada near Davis Dam, began in 1967 and the plant went into operation in 1971; construction on the Navajo Plant, located near Page, Arizona, began in 1970 and the plant became operative in 1975. The plants supply 1560 megawatts and 2370 megawatts of electric power respectively. It is public knowledge that over the next decade or more there is no viable alternative to the Mohave and Navajo Plants. Southwest Energy Study, Summary Report, 10-1; S. Rep. No. 92-1015, 92d Cong. 1st Sess., at 59 (1972). The two plants are dependent upon the coal from the lease in question.

[2] This brief is filed on behalf of the Peabody Coal Company, a Defendant below, and Intervenors below, six power companies with ownership interests in the Navajo and Mohave power plants who have contracted with Peabody Coal Company for coal from the land involved in the lease in question.

conflict between decisions or circuits, and there is no novel or important issue of federal law. The lower courts were correct in dismissing the suit for failure to join an indispensable party, the lessor of the lease.

ARGUMENT

I

THE HOPI TRIBE, AS LESSOR, IS AN INDISPENSABLE PARTY TO THIS ACTION TO CANCEL A LEASE

This is a suit to invalidate a coal lease — that is the sole result sought by Petitioners. The only parties to the lease are Peabody Coal Company's predecessor and the Hopi Tribe. Peabody has been made a party — the Hopi Tribe has not. The Court of Appeals stated the controlling principle:

> No procedural principle is more deeply inbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable. *Broussard v. Columbia Gulf Transmission Company*, 398 F.2d 885 (5th Cir. 1968); *Keegan v. Humble Oil & Refining Co.*, 155 F.2d 971 (5th Cir. 1946); *Tucker v. National Linen Service Corp.*, 200 F.2d 858 (5th Cir. 1953). *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975)

Professor Moore has summarized the recognized principle by noting that in any suit "to cancel or rescind a lease . . . all persons interested in the title or who will be directly affected by

the decree are indispensable parties."[3] Despite the multitude of cases cited by Petitioners, not one holds (nor have we found a single case holding) that a suit to invalidate a lease has been allowed to proceed to trial in the absence of one of the parties.

This case, involving a single lessor and a single lessee, with benefits to the lessor amounting to tens of millions of dollars, is the classic case for application of the principle.

A. There is No Conflict with *National Licorice.*

In a rather transparent effort to find a reason to interest this Court in what is actually a simple case involving application of

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[3] 3A Moore's Federal Practice, ¶ 19.09[1] pp. 2311-14. See also, *Tewa Tesuque v. Morton*, 498 F.2d 240 (10th Cir. 1974), *cert. denied* 420 U.S. 962 (1975); *Schutten v. Shell Oil Company*, 421 F.2d 869 (5th Cir. 1970); *Franz v. East Columbia Basin Irrigation District*, 383 F.2d 391 (9th Cir. 1967); *Green v. Wilson*, 331 F.2d 769 (9th Cir. 1964); *General Tire & Rubber Company v. Watkins*, 326 F.2d 926 (4th Cir. 1964); *Alexander v. Washington*, 274 F.2d 349 (5th Cir. 1960); *Brodsky v. Perth Amboy National Bank*, 259 F.2d 705 (3d Cir. 1958); *Ogden River Water Users' Ass'n v. Weber Basin W. Cons.*, 238 F.2d 936 (10th Cir. 1956); *Tucker v. National Linen Service Corp.*, 200 F.2d 858 (5th Cir. 1953); *Kentucky Natural Gas Corp. v. Duggins*, 165 F.2d 1011 (6th Cir. 1948); *Calcote v. Texas Pac. Coal & Oil Co.*, 157 F.2d 216 (5th Cir. 1946); *Carroll v. New York Life Ins. Co.*, 94 F.2d 333 (8th Cir. 1938); *Egyptian Novaculite Co. v. Stevenson*, 8 F.2d 576 (8th Cir. 1925); *Yazzie v. Morton*, 59 F.R.D. 377 (D. Ariz. 1973); *The Bootery, Inc. v. Washington Met. Area Transit Auth.*, 326 F. Supp. 794 (D. D.C. 1971); *Kleinschmidt v. Kleinschmidt Laboratories*, 89 F. Supp. 869 (N.D. Ill. 1950).

the Rule 19(b) criteria for indispensable parties.[4] Petitioners have claimed ostensible conflict with a decision of this Court, discrimination and conflicts with cases from other circuits.

First, they contend that the decision of the District Court and the Court of Appeals for the Ninth Circuit conflict with *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350 (1940). In *National Licorice Co.* this Court set aside a labor contract on the grounds that unfair labor practices had led to its execution. The some 140 employees affected by the contract were held not indispensable. The difficulties of joining more than 100 employees are readily apparent, and the Court recognized that its ruling was an exception to the general rule. The opinion states:

> In a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights. Ordinarily where the rights involved in litigation arise upon a contract, courts refuse to adjudicate the rights of some of the parties to the contract if the others are not before it. Shields v. Barrow, 17 How. 130, 140, 15 L.Ed. 158; Carroll v. New York Life Ins. Co., 8 Cir., 94 F.2d 333; cf. Waterman v. Canal-Louisiana Bank Co., 215 U.S. 33, 48, 30 S.Ct. 10,14,54 L.Ed. 80. Such a judgment or decree would be futile if rendered, since the contract rights asserted by those present in the litigation could neither be defined, aided nor enforced by a decree which did not bind those not present. 309 U.S. at 363.

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[4] The balancing of the four factors of Rule 19(b) to determine indispensable parties was extensively briefed and is adequately discussed in the opinion of the Court of Appeals for the Ninth Circuit. Weighing the considerations of Rule 19 is, of course, a matter within the trial court's discretion. *E.g. United States v. Elfer*, 246 F.2d 941, 946 (9th Cir. 1957); *Haas v. Jefferson National Bank of Miami Beach*, 442 F.2d 394, 400 (5th Cir. 1971); *Morrison v. New Orleans Public Service Inc.*, 415 F.2d 419, 424 (5th Cir. 1969); *General Tire & Rubber Company v. Watkins*, 326 F.2d 926, 929 (4th Cir. 1964).

The contract in the instant case is not a labor contract, it is a multi-million dollar lease. There is only one lessor, not one hundred. And, Petitioners here assert private rights, not public rights like those asserted by the NLRB, a public body, in *National Licorice*. This case is, therefore, subject to the general rule that "where the rights involved in litigation arise upon a contract, courts refuse to adjudicate the rights of some of the parties to the contract if the others are not before it." *National Licorice, supra.*

Petitioners contend that since the alleged rights are based upon the Hopi Constitution and not the coal lease that *National Licorice* is applicable. Petitioners miss one of the primary points of *National Licorice*, that generally interests arising upon a contract — *such as the interests of the Hopi Tribe in the coal lease* — will not be adjudicated in the absence of such parties. Regardless of the genesis of *their* interest, Petitioners cannot require the Court to adjudicate the rights of the lessor to the lease — the object of their action — in the absence of the lessor.

This is a case different from *National Licorice*, not the same case decided differently by a lower court.

B. There is No Issue of Discrimination Against Indians

Petitioners suggest that the decisions below will carve out a significant exception to the usual rules of judicial review. They do not. The District Court and Court of Appeals merely held that a lessor was indispensable to an action to invalidate a lease; and, weighing the factors present in this particular case, determined that Rule 19 required joinder of the lessor Hopi Tribe. It is no more and no less than a straightforward application of the criteria of Rule 19(b) to the facts of a specific case.

C. There is No Conflict Among the Circuits

Two cases are cited by Petitioners as conflicting with the decision below, *Littell v. Morton*, 445 F.2d 1207 (4th Cir. 1971), reversing *Littell v. Hickle*, 314 F. Supp. 1176 (D. Md. 1970), and *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972).

In *Littell v. Morton*, Rule 19 was not even argued or considered, and a cursory review of the opinion reveals the absence of any similarity to the facts of this case. It hardly presents a conflict of circuits such as to require resolution by this Court.

Davis v. Morton, likewise, does not present such a conflict. The issue in *Davis* was whether the provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321, *et seq.*, (requiring the filing of an environmental impact statement as a prerequisite to major federal action having a significant effect on the environment) applied to ratification or rejection of leases relating to Indian land. It was not an attack on the lease. Nor was the applicability of Rule 19 either raised by the parties or discussed by the Court in *Davis v. Morton* for the simple reason that it was not involved.

In fact, in a case involving the same lease, *Tewa Tesuque v. Morton*, 498 F.2d 240 (10th Cir. 1974), *cert. denied* 420 U.S. 962 (1975), the Tenth Circuit pointedly rejected the contention that *Davis v. Morton* involved the issue of indispensability of the Pueblo or cancellation of the lease. The issue in *Tewa Tesuque v. Morton* was identical to the issue in the instant case. The Court held that, in a suit by some members of the Pueblo to cancel a lease between the Pueblo and the lessee, the Pueblo was an indispensable party. The Court therefore affirmed the District Court's dismissal of the case for failure to join an indispensable party, the Pueblo-lessor. A petition to the Supreme Court for a writ of certiorari was denied.

Therefore, not only is there no conflict between circuits, the Ninth and Tenth Circuits have, in virtually identical situations, both held that a lessor Indian Tribe is an indispensable party in a suit to invalidate a lease.

II

SOVEREIGN IMMUNITY OF THE HOPI TRIBE IS NOT AN ISSUE

Sovereign immunity of the Hopi Tribe has not been questioned. The Ninth Circuit correctly held that because Indian tribes enjoy sovereign immunity and cannot be sued without their consent, if the Hopi Tribe were deemed to be indispensable to the litigation under Rule 19, the suit would necessarily terminate, since the Tribe has not consented to the suit. *Turner v. United States,* 248 U.S. 354, 358 (1919); *United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506, 512 (1940). The District Court could not grant the relief requested by Petitioners — that the Hopi Tribe be "ordered" into the suit. Further, where, as here, parties have disputed the acts of tribal governing bodies in intra-tribal disputes, courts have consistently declined jurisdiction on the ground of tribal immunity. See *Tewa Tesuque v. Morton,* 498 F.2d 240 (1974) *cert. denied* 420 U.S. 962 (1975); *Green v. Wilson,* 331 F.2d 769 (9th Cir. 1964); *Dicke v. Cheyenne-Arapaho Tribes, Inc.,* 304 F.2d 113 (10th Cir. 1962); *Native American Church v. Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959); *United States v. Blackfeet Tribal Court,* 244 F. Supp. 474 (D. Mont. 1965).

CONCLUSION

This case involves nothing more than application of the Rule 19(b) factors for determining whether an entity is an indispensable party to litigation — a factual analysis which is (and was) best performed by the District Court. Significantly, not one of the authorities cited by Petitioners holds or even suggests that an action to cancel a real property lease can proceed to

trial without joining the lessor. The Hopi Tribe is an indispensable party to this action.

Respectfully submitted,

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